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## State v. Johnson Respondent's Brief Dckt. 44193

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 44193
Plaintiff-Respondent,	)	
	)	Kootenai County Case No.
v.	)	CR-2011-14619
	)	
LANCE ALLEN JOHNSON,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Johnson failed to establish that the district court abused its discretion by revoking his probation and ordering executed a reduced unified sentence of 10 years, with three years fixed?

Johnson Has Failed To Establish That The District Court Abused Its Sentencing Discretion

In 2011, the state charged Johnson with money laundering, attempted trafficking in marijuana, possession of methamphetamine, possession of marijuana, and possession of drug paraphernalia with the intent to use. (R., pp.56-58.) Pursuant to a

plea agreement, Johnson pled guilty to money laundering and the state dismissed the remaining charges. (R., p.60.) On December 16, 2011, the district court imposed a unified sentence of 10 years, with five years fixed, suspended the sentence, and placed Johnson on supervised probation for four years with the condition that he serve 180 days in the county jail. (R., pp.66-71.) Johnson was released from the county jail on May 14, 2012, and transferred his supervision to North Dakota in September 2012. (R., p.73; PSI, p.31.<sup>1</sup>)

Approximately 17 months later, while in North Dakota, Johnson sold a half a pound of marijuana to a confidential informant for \$2,400.00. (PSI, p.50.) Two days later, on March 11, 2014, he sold three ounces of marijuana to a confidential informant for \$1,200.00. (PSI, p.50.) On March 17, 2014, Johnson sold one gram of methamphetamine to a confidential informant for \$250.00. (PSI, p.50.) He was subsequently charged, in North Dakota, with three counts of felony delivery of a controlled substance. (PSI, p.50.) On March 20, 2014, Johnson committed (in North Dakota) the new crimes of possession of methamphetamine, possession of diazepam, possession of hydrocodone, possession of methadone, possession of hash, possession of marijuana, and felony possession of drug paraphernalia. (PSI, pp.47-48.)

On May 23, 2014, Johnson was convicted, in relation to the above North Dakota charges, of five counts of felony possession of a controlled substance (methamphetamine, diazepam, hydrocodone, methadone, and hash), one count of

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<sup>1</sup> PSI page numbers correspond with the page numbers of the electronic file "JOHNSON #44193 PSI.pdf."

misdemeanor possession of a controlled substance (marijuana), one count of felony possession of drug paraphernalia, two counts of possession of marijuana with intent to deliver, one count of possession of methamphetamine with intent to deliver, and one count of ingesting a controlled substance. (PSI, pp.31-32, 36-51.) Johnson received an aggregate sentence of five years and was incarcerated in the North Dakota State Penitentiary. (PSI, p.32.)

Johnson's probation officer subsequently filed a report of violation in this case, alleging that Johnson had violated the conditions of his probation by committing the above-listed new crimes. (PSI, pp.31-33.) The district court issued a bench warrant on July 30, 2014, and Johnson was served with the warrant approximately two years later, in March 2016. (R., pp.74-75.) On May 2, 2016, Johnson admitted the allegation and the district court revoked his probation and ordered executed a reduced unified sentence of 10 years, with three years fixed. (R., pp.78-81.) Johnson filed a notice of appeal timely only from the district court's order revoking probation. (R., pp.82-85.)

Johnson asserts that the district court abused its discretion when, upon revoking his probation, it ordered executed a reduced unified sentence of 10 years, with three years fixed, rather than imposing the requested "180 days of jail and then [either] commuting the sentence" or reinstating him on probation, in light of his claim that "the district court could only reasonably conclude from [his] conduct that probation was achieving its rehabilitative purpose" because he "seemed to have served a 'good prison term' in North Dakota," because North Dakota "would be required to accept [him] if he were placed on probation in this case because of his parole status in North Dakota,"

and because he “has virtually no connection to Idaho.” (Appellant’s brief, pp.5-8 (citing Tr., p.18, Ls.20-23).) Johnson has failed to establish an abuse of discretion.

“Probation is a matter left to the sound discretion of the court.” I.C. § 19-2601(4).

The decision to revoke probation lies within the sound discretion of the district court. State v. Roy, 113 Idaho 388, 392, 744 P.2d, 116, 120 (Ct. App. 1987); State v. Drennen, 122 Idaho 1019, 842 P.2d 698 (Ct. App. 1992). When deciding whether to revoke probation, the district court must consider “whether the probation [was] achieving the goal of rehabilitation and [was] consistent with the protection of society.” Drennen, 122 Idaho at 1022, 842 P.2d at 701.

Upon revoking a defendant’s probation, a court may order the original sentence executed or reduce the sentence as authorized by Idaho Criminal Rule 35. State v. Hanington, 148 Idaho 26, 28, 218 P.3d 5, 7 (Ct. App. 2009) (citing State v. Beckett, 122 Idaho 324, 326, 834 P.2d 326, 328 (Ct. App. 1992); State v. Marks, 116 Idaho 976, 977, 783 P.2d 315, 316 (Ct. App. 1989)). A court’s decision not to reduce a sentence is reviewed for an abuse of discretion subject to the well-established standards governing whether a sentence is excessive. Hanington, 148 Idaho at 28, 218 P.3d at 7. Those standards require an appellant to “establish that, under any reasonable view of the facts, the sentence was excessive considering the objectives of criminal punishment.” State v. Stover, 140 Idaho 927, 933, 104 P.3d 969, 975 (2005). Those objectives are: “(1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrong doing.” State v. Wolfe, 99 Idaho 382, 384, 582, P.2d 728, 730 (1978). The reviewing court “will examine the entire record encompassing events before and after the original judgment,”

*i.e.*, “facts existing when the sentence was imposed as well as events occurring between the original sentencing and the revocation of probation.” Hanington, 148 Idaho at 29, 218 P.3d at 8.

Contrary to Johnson’s claim on appeal, his abysmal conduct while on probation in this case did not demonstrate that probation was achieving its rehabilitative purpose, particularly in light of his continued criminal behavior while in the community. Johnson has an extensive history of criminal offending. He was convicted of possession of marijuana in 2002, at age 18. (PSI, p.3.) Less than two years later, he committed the new crime of domestic assault with intent to inflict bodily harm, for which he received a withheld judgment and was placed on probation for two years, beginning on December 20, 2004. (PSI, p.3.) Johnson violated his probation five months later. (PSI, p.3.) Six months after that, he was charged with the new crime of felony possession of a controlled substance. (PSI, pp.4-5.) He was later convicted of a reduced charge of misdemeanor possession of marijuana, for which he was placed on probation for five years, and he was also found in violation of his probation in the domestic assault case, for which he was required to serve 54 days of jail time. (PSI, pp.4-5.) Just nine weeks later, on June 17, 2006, Johnson committed the new crime of felony possession of a controlled substance (“not small” amount of marijuana) and was sentenced to prison; however, his sentence was suspended for 10 years and he was again placed on probation. (PSI, pp.4-5.) He also incurred a third probation violation as a result of the new felony charge. (PSI, pp.4-5.)

Johnson was discharged from probation on December 8, 2008, and, approximately eight months later, he began transporting cash and drugs between

Minnesota and Oregon “on average twice per month.” (PSI, pp.5, 21.) He continued to make these bimonthly trips “to purchase drugs” over the next “1.5 to 2 years,” until August 11, 2011, when he was stopped for speeding and swerving across the center line while driving through Idaho, on his way to Oregon. (PSI, pp.2, 17, 20-21.) Johnson admitted that he “was under the influence of drugs or alcohol” at the time. (PSI, p.3.) He gave officers permission to search his vehicle and, upon conducting the search, officers found marijuana, methamphetamine, several methamphetamine and marijuana pipes, “multiple unknown green pills” that Johnson reported were “Oxycontin,” and a total of \$45,782.00 in cash, most of which was “wrapped with rubber bands, in what appeared to be \$1000 stacks,” inside vacuum-sealed bags. (PSI, pp.18-20.) Johnson told officers that the purpose of his trip was to drive to Oregon to “deliver a bag of money in exchange for drugs and then bring the drugs back to” his home state of Minnesota, where he “personally sells around 2 ounces of marijuana a week.” (PSI, p.21.)

The state charged Johnson (in this case) with money laundering, attempted trafficking in marijuana, possession of methamphetamine, possession of marijuana, and possession of drug paraphernalia with the intent to use; Johnson pled guilty only to the money laundering charge, in exchange for the dismissal of the remaining charges. (R., pp.56-58, 60.) The presentence investigator concluded that Johnson “has not learned from his past mistakes,” and that, due to the seriousness of Johnson’s actions in the instant offense, the harm such conduct does to communities, and “his history of probation violations, absconding, and failure to complete court-ordered programming within the community, it is highly unlikely that [Johnson] would do well if he is once

again placed on probation and allowed to interstate to Minnesota.” (PSI, p.12.) Despite this, the district court granted Johnson yet another opportunity to successfully complete a period of supervised probation. (R., pp.66-71.)

Rather than taking advantage of the opportunity, Johnson chose instead to resume his criminal behavior while on probation, committing – and subsequently being convicted of – nine new felonies and two new misdemeanor crimes in North Dakota, all of which were drug-related, and at least three of which involved Johnson selling illegal drugs. (PSI, pp.31-32, 36-51.) Johnson received an aggregate sentence of five years and was incarcerated in the North Dakota State Penitentiary for approximately two years before he was paroled and returned to Idaho to answer for the resulting probation violation in this case. (PSI, p.32; Tr., p.15, Ls.5-6; R., pp.75-76.) Johnson’s probation officer recommended that the district court revoke Johnson’s probation and order executed the original unified sentence of 10 years, with five years fixed, stating:

As can be seen from the defendant's continued disregard [sic] to obey the laws of society, as well as the terms and conditions of probation, it appears he does not appreciate the opportunity of probation awarded to him, nor has he shown he is ready to be a productive member of society. Furthermore, the defendant's continued criminal/anti-social behavior seems to indicate he may lack the tools needed to be a productive member of society, and, therefore, may not be an appropriate candidate for community supervision. It is the opinion of this officer that the defendant is in need of a greater level of supervision and treatment at this time and would benefit from a more structured environment, free from any outside distractions or temptations.

(PSI, p.32.)

At the disposition hearing for Johnson’s probation violation, the district court concluded:



Well, apparently the consequences didn't change the behavior because you go back to selling drugs again in North Dakota. So knowing the consequences must not be a deterrent to you as you had indicated.

...

I disagree with the plea agreement today. I don't think reinstating you on probation is the appropriate sentence. I certainly don't think commuting it is the appropriate sentence. I think the protection of society is the foremost factor for the Court to consider today. I'm not satisfied that the community, not just Idaho, but whatever community you're involved in is adequately protected with reinstatement on probation.

I don't think reinstatement on probation serves as a deterrence [sic] to anybody else in a similar situation as you. I don't think it adequately addresses the punishment that society expects.

And, therefore, I am revoking your probation.

(Tr., p.21, L.21 – p.22, L.23.) The district court considered the fact that Johnson had served approximately two years in a North Dakota prison for the nine new felonies he committed in North Dakota while on probation in this case, and showed leniency by reducing the fixed portion of Johnson's sentence in this case by two years. (Tr., p.22, L.24 – p.23, L.2.) Johnson has failed to show that he was entitled to further leniency, and he is clearly no longer a viable candidate for community supervision, given the fact that he committed nine new felonies and two new misdemeanors during the less than two-year period (May 2012 through March 2014) that he was actually *in the community* while on probation in this case. (R., pp.66-71, 73-76; PSI, pp.31-32, 36-51; Tr., p.15, Ls.5-6.) That Johnson "seemed to have served a 'good *prison term*' in North Dakota" (Appellant's brief, p.6 (emphasis added)) for the numerous new felony crimes he committed in that state does not indicate that he would perform well while *out of custody*; in fact, his ongoing criminal offending and unwillingness to abide by the terms of community supervision suggest precisely the opposite.

Johnson's escalating pattern of criminal offending, particularly over such a short period of time, does not, in any way, demonstrate that probation was achieving its rehabilitative purpose. To the contrary, Johnson's abject refusal to abide by the law or the terms of community supervision demonstrate his complete failure to rehabilitate and his continued danger to society. The district court was correct to decline to commute Johnson's sentence or to reinstate him on probation. Given any reasonable view of the facts, Johnson has failed to establish that the district court abused its discretion when it revoked his probation and ordered executed a reduced unified sentence of 10 years, with three years fixed.

#### Conclusion

The state respectfully requests this Court to affirm the district court's order revoking Johnson's probation and executing a reduced unified sentence of 10 years, with three years fixed.

DATED this 16th day of November, 2016.

/s/ Lori A. Fleming  
LORI A. FLEMING  
Deputy Attorney General

VICTORIA RUTLEDGE  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 16th day of November, 2016, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

BEN P. MCGREEVY  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: [briefs@sapd.state.id.us](mailto:briefs@sapd.state.id.us).

\_\_\_\_\_  
/s/ Lori A. Fleming  
LORI A. FLEMING  
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